UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

02 JUN 20 AM 9:33

DAVID KUBE,

Plaintiff,

vs. USDC No. CIV-02-0710 WPJ RLP

CITY OF TEXICO, a New Mexico Municipality;
KELLEY BROPHY, individually and as Chief of Police;
JERRY CUNNINGHAM, individually and as Mayor;
ORAN JAY AUTREY, individually, and as Personnel Director, and Council Member;
MONNIE CUNNINGHAM, individually and as Council Member,
SHARON ASKEW, individually and as Council Member, and
DOUG SCIOLI, individually and as Council Member,

Defendants.

JURY DEMAND

COMPLAINT FOR CIVIL RIGHTS VIOLATIONS

COMES NOW Plaintiff, by and through his attorney of record, J. Edward Hollington, J. Edward Hollington & Associates, and for his Complaint against the Defendants, states:

I. **Jurisdiction and Venue:**

1. Plaintiff is a resident of Texico, New Mexico.

2. Defendant Texico, is a New Mexico municipality.

3. Defendant Kelley Brophy is a resident of Clovis, New Mexico, and at all times material to this action was the Chief of Police of Texico, New Mexico.

4. Defendant Jerry Cunningham is a resident of Texico, New Mexico, and at all times material to this action was the Mayor of Texico, New Mexico.

5. Defendant Oran Jay Autrey is a resident of Texico, New Mexico, and at all times material to this action was the Personnel Director and member of the City Council.

6. Defendant Monnie Cunningham is a resident of Texico, New Mexico, and at all times material to this action was a Council Member of the City of Texico.

7. Defendant Sharon Askew is a resident of Texico, New Mexico, and at all times material to this action was a Council Member of the City of Texico.

8. Defendant Doug Scioli is a resident of Texico, New Mexico, and at all times material to this action was a Council Member of the City of Texico.

7. All actions and transactions pertinent to this lawsuit occurred in Texico, New Mexico.

9. Jurisdiction is properly before this Court pursuant to 28 USC, § 1331, 1367, and 42 USC, 1983.

10. Venue is properly before this Court.

II. **Statement of Facts:**

1. Plaintiff was hired as a police officer for the City of Texico in April of 1999.

2. Plaintiff received favorable performance evaluations during his employment with Texico.

3. Defendant, City of Texico, had in force City of Texico Personnel Policy Manual during April of 2002.

4. Pursuant to § 702 of the City of Texico Personnel Policy Manual, an employee who completed a probationary period could not be disciplined except for cause.

5. Plaintiff was not a probationary employee in April of 2002.

6. Pursuant to § 703 of the City of Texico Personnel Policy Manual, Defendants agree to follow progressive discipline procedures.

7. Pursuant to § 801 of the City of Texico Personnel Policy Manual, any disciplinary action must be preceded by a written Notice of Intent to Suspend, Demote, or Dismiss, and such notice must be provided at least five days before such disciplinary action. The notice must also explain the reasons for the proposed action and provide notice to an employee of the right to request a pre-disciplinary hearing.

8. As a police officer employed by a New Mexico municipality, any disciplinary action against Plaintiff must comply with provisions of the Peace Officers' Employer-Employee Relations Act, NMSA 1978, § 29-14-1 et seq. (1991).

9. Pursuant to the New Mexico Peace Officers' Employer-Employee Relations Act, a police officer is to be allowed an opportunity to produce relevant documents and witnesses to support his case during any grievance or appeal involving disciplinary action.

10. Plaintiff had a protected property right in his employment as a police officer with the City of Texico.

11. On April 23, 2002, Plaintiff was sent a written letter of termination by Defendant Kelley Brophy, and the effective date of the termination was April 22, 2002.

12. The letter of termination contained an allegation that Plaintiff was terminated for conduct unbecoming an employee of Texico pursuant to Article VII, § 703(4)(E) of the City of Texico Policy and Procedures.

13. The phrase "conduct unbecoming an employee of Texico" is not defined or explained in the City of Texico Personnel Policy Manual.

14. Plaintiff was not provided notice of charges or evidence to be brought against him prior to his termination of April 22, 2002.

15. Plaintiff was not provided with a pre-termination hearing prior to April 22, 2002.

16. On April 25, 2002, Plaintiff submitted a written notice of appeal to Clerk of the City of Texico, notifying the Defendants of his appeal of his termination.

17. On April 23, 2002, Defendant, Kelley Brophy, sent out a public notice to surrounding county and municipal law enforcement agencies notifying them that the Plaintiff was no longer employed with the Texico Police Department.

18. The Defendants did not usually and customarily send notices of termination to other law enforcement agencies when a police officer's employment was terminated.

19. On April 26, 2002, Defendant City of Texico notified the New Mexico Public Employees Retirement Agency (PERA) that Plaintiff was terminated effective April 19, 2002. Later, Defendant notified PERA that the date of termination was April 22, 2002.

20. Defendants did not comply with pre-disciplinary hearing procedures as set out in Article VIII, § 802 prior to terminating Plaintiff's employment.

21. The Defendants ignored Plaintiff's Notice of Appeal filed on April 25, 2002, and failed to provide him with a post-termination hearing pursuant to Article VIII, § 802-804 of the City of Texico Personnel Policy Manual.

22. On May 1, 2002, the City Council of Texico met, and without giving Plaintiff prior notice, voted to uphold the termination. Plaintiff was given no prior notice that his termination would be considered, nor was he given notice of any charges or evidence to be presented against him, and he was not given an opportunity on May 1, 2002 to answer charges, present evidence, or make statements.

23. Defendants were final decision-makers regarding Plaintiff's termination of employment.

24. The Defendants act of terminating Plaintiff's employment was done under color of state law.

25. On May 7, 2002, Plaintiff's attorney sent a letter to Defendant City of Texico explaining the various violations of Plaintiff's rights which occurred because of Plaintiff's termination. Plaintiff requested reinstatement and a chance to have a fair and impartial hearing.

26. Defendants provided no written response to Plaintiff's May 7, 2002 letter.

27. Plaintiff has lost income, back pay, front pay, benefits, and has experienced humiliation and emotional distress as a result of the Defendants' conduct against him.

28. The individual Defendants' conduct constitute wanton, willful, malicious and reckless disregard of Plaintiff's rights, and Plaintiff is entitled to punitive damages.

29. Plaintiff has incurred attorney fees and costs in bringing this action, and is entitled to reimbursement for his reasonable attorney fees and costs.

COUNT I
VIOLATIONS OF PROCEDURAL DUE PROCESS

30. Plaintiff incorporates the allegations made in the foregoing paragraphs nos. 1-29, as though the same were set forth herein.

31. As a non-probationary police officer of the City of Texico, Plaintiff had a protected property right in his employment.

32. Plaintiff was not provided with prior notice of any charges or evidence to be brought against him prior to his termination.

33. Plaintiff was not provided with a pre-termination hearing.

34. As a proximate result of Defendants' wrongful termination of Plaintiff's employment, Plaintiff has lost income, back pay, front pay, benefits, pecuniary losses, and compensatory damages, including, but not limited to, humiliation and emotional distress.

35. Individual Defendants' conduct was wonton, willful, malicious, and done in reckless disregard for Plaintiff's rights.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in his favor and against the Defendants, and award him damages, including, but not limited to loss of income, back pay, front pay, benefits, pecuniary losses, compensatory damages, punitive damages, attorney fees and costs, prejudgment and post-judgment interests, and for such other and further relief as the Court deems just and appropriate.

COUNT II
VIOLATIONS OF SUBSTANTIVE DUE PROCESS

36. Plaintiff incorporates the allegations made in the foregoing paragraphs nos. 1-35, as though the same were set forth herein.

37. On June 27, 2000, the City of Texico adopted the City of Texico Personnel Policy Manual pursuant to a vote of the City Council in an open meeting.

38. Pursuant to Article VII, § 703(4)(e), the City of Texico Personnel Policy Manual provides for dismissal of a City employee for "conduct unbecoming an employee of the City of Texico."

39. The City of Texico Personnel Policy Manual does not define or describe for City employees any actions, statements, inactions or transactions which might constitute "conduct unbecoming an employee of the City of Texico."

40. The phrase "conduct unbecoming an employee of the City of Texico" fails to provide reasonable certainty to employees of specific acts, conduct, statements or transactions that constitute a violation of that particular policy and procedure.

41. The phrase "conduct unbecoming an employee of the City of Texico" is vague and ambiguous.

42. The Defendants' termination of Plaintiff's employment based on "conduct unbecoming an employee of the City of Texico" constitutes an arbitrary and capricious deprivation of Plaintiff's fundamental rights under the 14th Amendment to the United States Constitution.

43. As a result of Defendants' violation of Plaintiff's substantive due process rights, Plaintiff has suffered loss of income, back pay, front pay, benefits, pecuniary losses, and compensatory damages, including, but not limited to, humiliation and emotional distress. Individual Defendants' conduct constitute wanton, wilful, malicious and careless disregard of Plaintiff's rights.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in his favor and against the Defendants, and award him damages, including, but not limited to loss of income, back pay, front pay, benefits, pecuniary losses, compensatory damages, punitive damages, attorney fees and costs, prejudgment and post-judgment interests, and such equitable relief as the Court deems just and appropriate, including, but not limited to enjoining the Defendants from using "conduct unbecoming a City employee" as a basis for disciplinary action against City employees, reinstating Plaintiff's employment, and such other and further relief as the Court deems just and appropriate.

COUNT III
BREACH OF CONTRACT

44. Plaintiff incorporates the allegations made in the foregoing paragraphs nos. 1-43, as though the same were set forth herein.

45. The City of Texico Personnel Policy Manual, and the New Mexico Peace Officers' Employer-Employee Relations Act constitute implied contracts.

46. Defendants breached Plaintiff's implied contractual rights in the manner and procedure in which it terminated Plaintiff's employment.

47. As a direct result of Defendants' breach of Plaintiff's implied contractual rights, Plaintiff has suffered damages, including, but not limited to loss of income, back

pay, front pay, benefits, pecuniary losses, compensatory damages, punitive damages, attorney fees and costs, prejudgment and post-judgment interests.

WHEREFORE, Plaintiff respectfully requests this Court to enter judgment in his favor and against the Defendants, and award him damages, including, but not limited to loss of income, back pay, front pay, benefits, pecuniary losses, compensatory damages, punitive damages, attorney fees and costs, prejudgment and post-judgment interests, and for such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

J. EDWARD HOLLINGTON & ASSOCIATES, P.A.

By: ______________________
J. Edward Hollington
Attorney for Plaintiff
708 Marquette Avenue N.W.
Albuquerque, NM 87102-2035
(505) 843-9171
(505) 843-7027 fax

E:\DATA ON SERVER D\Kube\Pleadings\Complaint.wpd